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No._____

IN THE

Supreme Court of the United States

Eldon Dufrene, et al.,

Petitioners,

vs.

Browning-Ferris, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fair Labor Standards Act permits an employer to use the "day rate, job rate" method of compensation and overtime calculation found in the Department of Labor Interpretive Bulletin at 29 C.F.R. § 778.112, to classify and pay its employees as day rate employees where:

> The employer provides no definition of or limitation upon the number of hours the employee can be required to work or the jobs the employee must perform to earn the day rate.
>
> The employees are permanent, full-time employees receiving full-time employment benefits including paid vacation, sick days, health insurance, and participation in the employer's pension plan.

PARTIES TO THE PROCEEDING

Petitioners

Eldon Dufrene, Everett James McGee, Jr., Chad Keith Byrd, Howard Self, Kevin Melendez, Floyd Domino, Johnny Green, Melvin L. Gaines, Jr., Lolita Payre, Jerry Beloney, Wayne D. Magee, Michael Beach, Louis Dabney, Charley Martin, Charles Broome, Michael Gould, Shawn A. Morney, Michael Nelson, Anthony Milton Cowan, Anthony Lavon Hawkins, Kintay Thompson, George Airline, Jr., Jeffery L. Horne, Darren Ogden, Christopher Waker, Andrew James, Arnold L. Thomas, Roland Hayes Turner, Jr., Samuel Black, Jr., Tyrone Palmer, Felmon Rushing, Tannis Ward , Michel Haynes, Nathaniel Waker , Sarah Faulkner , Shafter St. Cyr , Alvia Lewis , Larry Williams , Danny Scott , Alex J. Hurst, Eric Brown, Craig Campo, Leon Batiste, James E. Robinson, Percy Braggs, Herbert Martin, Jr., Norman P. Leche, Jr., Jesse Scott, Jr., John Lacy, Ernest Johnson, Sr., Vernon Ross, Odell Hardy, Jr., Warren Gilbert, Timmy Nabor, Roy G. Evans, Brainell Bozeman, Ronnie Gooden, David Williams, L.C. Harris, Patrick Price, Apolinario Joao Gregario, Alfred Cooper, Cornelius Washington, and Edward Davis.

Respondent

Browning-Ferris, Inc.

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OPINION BELOW

The opinion of the United State Court of Appeals for the Fifth Circuit that gives rise to this petition is reported at 207 F.3d 264. It is reprinted in Appendix A (Apx. 1). The opinion of the District Court for the Eastern District of Louisiana is published at 994 F. Supp. 748 (E.D. La. 1998), and is included in Appendix B (Apx. 9).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on March 20, 2000. This petition for writ of certiorari is filed within 90 days of the date on which the appellate court decision was entered. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

Fair Labor Standards Act, § 7(a)(1), 29 U.S.C. § 207(a)(1)

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

***

29 C.F.R. § 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra

half-time pay at this rate for all hours worked in excess of 40 in the workweek.

STATEMENT OF THE CASE

The respondent, Browning Ferris, Inc. ("BFI") employed the sixty-four petitioners as residential garbage and recycling drivers and hoppers (referred to collectively as "Workers"). Workers are regular, full-time BFI employees with year-round jobs. After a 60-day probationary period, Workers receive holiday pay and two paid personal days. After one year of continuous service for BFI, Workers are entitled to one week of paid vacation. BFI pays Workers on a weekly basis and prepares a weekly schedule, scheduling Workers to work five to six days each week.

BFI classifies the Workers as day rate employees, and pays Workers a day rate. BFI pays Workers a daily rate, ranging from $69.50 per day for hoppers to $76.00 per day for recycling truck drivers. BFI does not limit what constitutes the temporal length of a "day," or identify in any fashion the quantity of work that Workers must perform, to earn their "day rate."

Workers report for work each day between 4:30 and 5:00 A.M. BFI assigns them a specific collection route each day. On most days, Workers can finish their assigned collection route in eight hours or less. After they complete garbage collection on their assigned route, however, BFI usually requires Workers to collect all or part of another route. BFI also intentionally leaves collection routes unstaffed and requires Workers to collect these unstaffed routes upon completion of their assigned routes. Workers

have no idea from one day to the next, how long they will be required to work, or the number of full or partial routes that BFI will require them to pick up, before allowing them to clock out and go home. In short, BFI places no limit upon the hours that BFI can require Workers to labor or the jobs that BFI can require Workers to perform to earn their "day rate." A "day's work" for Workers at BFI is variable, changing continuously day to day, throughout each day, hour to hour, and minute to minute.

BFI refers to its "day rate" compensation scheme for Workers as "Chinese Overtime." The "day rate" compensation scheme as utilized by BFI allows BFI to reduce its labor costs and increase its profits by increasing the hours that Workers must labor to earn their "day rate." Under its "Chinese Overtime" scheme, BFI remains free to unilaterally dictate, increase, and control the number of hours that Workers must labor and the jobs that Workers must perform on any given day to the detriment of Workers' well-being and to BFI's economic benefit and competitive advantage.

Workers filed suit against BFI, on behalf of themselves and others similarly situated, to recover unpaid minimum wages and overtime compensation under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* Subsequently, Workers and BFI filed cross motions for summary judgment on the validity of BFI's "Chinese Overtime" compensation scheme. Workers maintained that BFI's "day rate," "Chinese Overtime" scheme violated the FLSA and the DOL Interpretive Bulletins, because, inter alia: 1) BFI placed no limitation upon hours worked in a given day and provided no description or definition of the job

Workers must perform to earn the "day rate;" and 2) the day rate, job rate method of compensation was not applicable to full-time, regular employees such as Workers. BFI argued that it complied with all applicable laws and regulations. The district court granted BFI's motion for summary judgment and denied Workers'.

In addressing Workers' argument that § 778.112 was not intended to apply to full-time, regular employees, the court rejected the analysis of *Friedrich v. U.S. Computer Serv.*, 833 F.Supp. 470, 474-75 (E.D. Pa. 1993), finding that "§ 778.112 is not on its face so limited and its language is broad enough to encompass regular employees such as plaintiffs who are explicitly employed on a daily-rate basis." (Appendix B, Apx. 19-20.) The court further found that BFI's designation and treatment of Workers as "day rate" employees was the controlling factor in determining the applicable payment and overtime compensation method. The court concluded "that, because the workers are paid according to a daily rate, BFI need not abide by § 778.114 and must only comply with the requirements set forth in the regulation covering daily rate employees." (Appendix B, Apx. 18-19.) The district court did not address or comment upon Workers' argument that by failing to define or place some limitations upon the number of hours in a day or the jobs that Workers were expected to perform to earn the day rate, BFI's compensation scheme violated the FLSA.

Workers appealed the district court's decision to the Fifth Circuit. Workers again argued the invalidity of BFI's "Chinese Overtime" compensation scheme on the grounds that such a scheme could not be upheld as compliant with

the FLSA where, as here, 1) the length and requirements of a "day" or a "day's work" were variable and wholly within the power of BFI to determine on a daily or hourly basis, and 2) Workers were permanent, full-time employees, not daily laborers. The Fifth Circuit affirmed the district court's decision, ruling that BFI's method of paying overtime to its day-rate employees does not violate the FLSA. (Appendix A, Apx. 1.) The Fifth Circuit did not address the issue that BFI's "Chinese Overtime" scheme violated the letter and spirit of the FLSA because a day or a day's work cannot be quantified and is subject to BFI's daily determination. The Fifth Circuit also did not address the issue that Workers, as full-time, permanent employees could not be compensated as day rate laborers. Like the district court, the Fifth Circuit was persuaded that BFI's designation and treatment of Workers as day rate employees determined the applicable payment and overtime compensation method. Thus, because BFI classified and paid Workers as day rate laborers, the Fifth Circuit found that § 778.112 governed Workers' overtime and compensation calculations.

Workers invoked the jurisdiction of the district court under 29 U.S.C. § 216(b) and 28 U.S.C. § 1332. Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291, which vests jurisdiction in the courts of appeals to hear appeals from final judgments of the district courts of the United States.

REASONS FOR GRANTING THE WRIT

I. The Decisions Below Cannot Be Squared With this Court's Decision On An Important Issue Affecting the Administration of the Fair Labor Standards Act.

BFI classifies Workers as day rate employees and pays Workers a day rate. Under the DOL Interpretive Bulletin relied upon by BFI, a day rate or job rate employee "is paid a flat sum for a day's work or for doing a particular job..." 29 C.F.R. § 778.112. To determine whether BFI's overtime compensation scheme complies with the day rate, "job rate overtime compensation method the following questions must answered: 1) What is a "day's work"? or 2) What is the "particular job" that Workers must perform to earn their day rate? The lower courts did not address or examine the answers to these fundamental questions in upholding BFI's "Chinese Overtime" scheme. The undisputed record evidence answers these questions and reveals that BFI's "Chinese Overtime" scheme is a sham designed to circumvent the FLSA.

Conspicuously absent from the day rate compensation method used by BFI is any limit on the number of hours a Worker must labor, or a description of the specific job or jobs a Worker must perform, to earn his or her day rate. When Workers report to BFI in the pre-dawn hours of the day, they have no way of discerning how long BFI will require them to work or how many routes BFI will require them to pick up before BFI permits them to call it a day and go home to their families. Although BFI assigns Workers a route each day, they are not free to clock out and go home when they complete garbage collection on

their assigned route. To the contrary, BFI usually sends Workers to collect garbage on another route, or on a route that BFI has intentionally left unstaffed, after they complete their assigned route. There is no temporal limit on a day, *i.e.*, a twelve hour day, nor is there a description of the work Workers are expected to perform in a day to earn the day rate, *i.e.*, an expressed number of routes, streets, houses, garbage cans, or pounds of garbage collected. Returning to the question of what constitutes a "day's work" for BFI's Workers, the simple answer is: ***a day encompasses whatever BFI requires of Workers on any given day.***

By upholding the validity of BFI's day rate compensation scheme absent parameters on what BFI can require of Workers to earn the day rate, the courts below have left BFI and other employers free to manipulate and abuse the day rate, job rate method of overtime compensation found in the DOL Interpretive Bulletin at 29 C.F.R. § 778.112, forcing Workers to endure uncertain and unreasonably long hours, amounting to mandatory, marginally compensated overtime.

Such a result cannot be reconciled with this Court's ruling in *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U.S. 572, 581 (1942), which held that even in employment situations where the wage paid is sufficient to cover base pay and fifty per cent additional for overtime hours worked, there is a violation of the law where there is 1) "no contractual limit upon the hours which petitioner could have required respondent to work for the agree wage, had he seen fit to do so..."; and 2) "no provision for additional pay in the event the hours worked

required minimum compensation greater that the fixed wage." In holding the employer's compensation method invalid under the FLSA because it lacked both of the requirements deemed essential to such payment methods, this Court concluded that "[i]mplication cannot mend a contract so deficient in complying with the law." *Id.*

Although the district court and the Fifth Circuit cite *Missel*, they do so only to support their determination that there is no violation of the FLSA where increased hours result in a lower regular rate and lower overtime compensation. (Appendix A, Apx. 5 and Appendix B, Apx. 17.) The courts below fail to adhere to and apply the holding of this Court that overtime compensation methods involving fixed wages and variable hours comply with the FLSA only where the employer 1) has placed limits on what the employee must do to earn the fixed wage, and 2) has provided for additional compensation when the hours worked require compensation greater that the fixed wage.

Neither requirement deemed essential to the validity of the fixed wage, fluctuating hours overtime compensation method used by the employer in *Missel* can be found in BFI's "Chinese Overtime" scheme. Therefore, the decisions of the courts below cannot be squared with this Court's holding in *Missel*, which requires a finding that BFI's "Chinese Overtime" compensation scheme violates the FLSA because it leaves BFI free to unilaterally apply continually changing and increasingly burdensome work requirements upon its "day rate" Workers. This result gives employers such as BFI the authority to freely disregard the FLSA by engaging in labor conditions

detrimental to the maintenance of the health, efficiency, and general well-being of workers to the concomitant detriment of commerce and the channels of commerce. *Missel*, 316 U.S. at 576-78. *See also* 29 U.S.C. § 202(a).

II. This Case Involves Far Reaching, Recurring Issues Vital to the Integrity of the Overtime Requirements of the Fair Labor Standards Act.

The effect of the decisions rendered in the courts below is that every employee, who is classified by their employer as a day rate employee and who is paid a day rate, becomes a day rate employee regardless of the realities of the employment relationship. (Appendix A, Apx. 6-7; Appendix B, Apx. 18-20.) The Fifth Circuit, in *Hartsell v. Dr. Pepper Bottling Company of Texas*, 207 F.3d 269, 273 (5th Cir. 2000), made abundantly clear the import of its ruling in the instant case when finding "[a]ll that is required [by § 778.112] is that an employee be, in fact, paid a day-rate." In support of this conclusion, the Fifth Circuit cites *Dufrene*, the case *sub judice*. *Id.* Indeed, the Fifth Circuit did not even consider or examine the facts surrounding the employment relationship in holding the day rate method applicable to Workers, apparently finding them irrelevant to the inquiry regarding the applicability of § 778.112.

The district court decision, affirmed by the Fifth Circuit, examines the facts and circumstances of Workers employment, and expressly rejects Workers' argument that the § 778.112, day rate, job rate method of compensation, cannot be applied to full-time, regular employees receiving full-time employment benefits. The

district court held that because BFI pays Workers a daily rate, that fact alone controls in determining whether to apply the compensation and overtime calculation method set forth in § 778.112. (Appendix B, Apx. 18-19.)

In the courts below, Workers urged the adoption of the sound and logical analysis and reasoning used by the district court in *Friedrich v. U.S. Computer Services, Inc.*, 833 F. Supp. 470, 474-75 (E.D. Pa. 1993), when determining whether an identical state counterpart to § 778.112 applied to certain employees. In *Friedrich*, an employer had classified its field engineers as day rate employees and paid them a day rate. Instead of blindly accepting the employer's designation and method of payment as controlling, as the lower courts did in the instant case, the *Friedrich* court examined the realities of the employment situation and found significant that the employees "had steady, consistent, year-round jobs with one employer. They received paid vacations, holidays, and sick days." Id. at 474. The *Friedrich* court further reasoned that the day rate classification "seems to apply to employees such as migrant farm workers, seasonal construction workers, house painters and other independent contractors who offer their services on a per-day or per job basis for a flat fee." *Id.* at 475.

Instead of providing a reasoned basis for rejecting the analysis used in Friedrich, the district court in the instant case adopted the circular argument suggested by BFI—Workers are day rate employees because BFI pays them a day rate—and ruled "that § 778.112 is not on its face so limited and its language is broad enough to encompass employees such as the plaintiffs who are

explicitly employed on a daily-rate basis." (Appendix B, Apx. 19-20.) This circuitous position enables any employer to take advantage of the day rate method exception to the compensation and overtime calculation requirements of the FLSA simply by labeling an employee a day rate employee and paying the employee a day rate. By classifying their employees as day rate workers, virtually every employer could accomplish what the lower courts have allowed BFI to do in the instant case—significantly reduce labor costs and increase their competitive advantage by working their employees longer hours with half-time overtime pay, rather than hiring additional workers. The holdings of the courts below, which facilitate and encourage this result, fly in the face of the FLSA.

Day rate employee status and the use of the day rate method of compensation and overtime calculation cannot, as the decisions of the courts below have permitted, simply be left for the employer to decide. There must be boundaries set by the courts to guide employers and employees in identifying the types of employees and the employment circumstances that must exist for an employer to classify and pay its employees as day rate laborers. The decisions of the courts below place in the hands of the employer the sole authority to make each working man and woman in this country, regardless of their actual status as full-time, regular employee, a day rate worker. Using the rulings of the courts below, every employer can circumvent the FLSA overtime requirements merely by designating and compensating their employees as day rate workers. Such a result eradicates the

protections afforded by the FLSA and should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31321

ELDON P. DUFRENE, ET AL.,

Plaintiffs,

ELDON P. DUFRENE, ERNEST JOHNSON, SR., on behalf of themselves and others similarly situated, KEVIN MELENDEZ, HOWARD SELF, VERNON ROSS, ET AL.,

Plaintiffs–Appellants,

versus

BROWNING–FERRIS, INC.,

Defendant–Appellee.

[207 F.3d 264]
March 20, 2000 [Filed]

Before JONES, BARKSDALE, and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

For the summary judgment awarded Browning–Ferris, Inc. (BFI), on the basis that overtime paid its day–rate employees is not violative of the Fair Labor Standards Act, 29 U.S.C. § § 201-19 (FLSA), primarily at issue is whether 29 C.F.R. § 778.112 (method for computing overtime pay for day–rate employees) is a permissible interpretation of the FLSA. We **AFFIRM**.*

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*This case was consolidated for oral argument with Hartsell v. Dr. Pepper Bottling Co., [207] F.3d [269] (5th Cir. 2000), which also concerns 29 C.F.R. § 778.112—particularly, whether employees must have agreed to be paid on a day-rate

I.

Dufrene and the other plaintiffs (employees) are or were employed by BFI as drivers for recycling trucks or as drivers or hoppers for garbage trucks. (Hoppers ride on the truck, retrieve garbage, and empty it into the truck.)

BFI paid employees a day–rate: they were guaranteed a day's pay, regardless of the number of hours worked that day. After a 60-day probationary period, they received holiday pay, and certain sick days. After one year of service, they received one week paid vacation.

Employees state that BFI regularly required them to work in excess of 40 hours a week; and that they were almost never allowed to stop working after eight hours or less, even if that day's assigned route was completed, but, instead, were required to work additional routes.

In district court, the parties stipulated:

> The overtime compensation is calculated as follows: Employees are given their day rate and it is multiplied by the number of days worked to determine the amount of compensation due [for the week]. The total amount of compensation is then divided by the total number of hours worked to derive the hourly rate. The hourly rate is then divided by 2 and that amount is multiplied by the number of overtime hours. This calculation yields the total amount to be paid in overtime.

In March 1997, employees filed this action, claiming this method violated the FLSA. On cross motions for

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basis in order for the section to apply. The opinion in that case is being issued simultaneously with this opinion.

summary judgment, the district court held: employees were paid a day–rate; BFI's overtime method complied with 29 C.F.R. § 778.112; and, correspondingly, it did not violate the FLSA.

II.

A summary judgment is reviewed *de novo*. *E.g., Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). For that review, we apply the same standard as the district court. *E.g., Drake v. Advance Const. Serv., Inc.*, 117 F.3d 203, 204 (5th Cir. 1997). Such judgment is proper when the summary judgment record, viewed in the light most favorable to non-movant, establishes there is no material fact issue and movant is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(c); *Drake*, 117 F.3d at 204.

Employees contend that the overtime method violates the FLSA; that 29 C.F.R. § 778.112 does not apply, because they did not clearly understand it would be used in calculating their overtime pay, and, alternatively, because they receive "other compensation", as referenced in that section; and finally, their collective bargaining agreement defines a day as eight hours, the day–rate compensates them only for working eight hours, and, correspondingly, they are entitled to additional compensation for hours worked in excess of that.

A.

Employees maintain that the overtime method violates the FLSA requirement to pay time and a half for all hours worked in excess of 40 in a week. BFI responds that it pays such overtime in accordance with 29 C.F.R. § 778.112, one of the Department of Labor's interpreta-

tions of the FLSA's overtime payment requirements. An administrative agency's statutory interpretation is reviewed pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (if intent of Congress is clear, give it effect; if such intent ambiguous or silent, did Congress delegate to agency authority to interpret statute; and, if such delegation and if agency's interpretation permissible, court should defer to it).

1.

The interpretation at issue, 29 C.F.R. § 778.112, provides:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

Addressed first is "whether Congress has directly spoken to the precise question at issue". *Chevron*, 467 U.S. at 842. Section 7(a)(1) of the FLSA provides in pertinent part that

> no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not

> less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (emphasis added).

At issue is what is that "regular rate" for employees paid by a day, *not hourly*, rate. Because the FLSA does not define "regular rate ", Congress did not clearly express its intent on this precise question.

The second inquiry is whether Congress delegated to the Secretary of Labor authority to interpret "regular rate". Chevron, 467 U.S. at 843-44. Congress explicitly granted the Secretary the duty to administer the FLSA. 29 U.S.C. § 204. "By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret" 29 U.S.C. § 207(a)(1), the FLSA provision at issue. *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir. 1993).

The third inquiry is whether § 778.112 is a permissible interpretation of the FLSA; if it is, it is entitled to deference. *Chevron*, 467 U.S. at 844. Employees make much of the undisputed fact that the greater the number of hours worked, the lower the regular rate, and, as a result, the lower the overtime compensation.

But, "that does not cause the system to run afoul of the FLSA if, as in this case, the regular rate remains constant within each workweek and the employee receives one and one-half his regular rate of compensation". *Condo*, 1 F.3d at 605. Cf. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580, 86 L. Ed. 1682, 62 S. Ct. 1216 (1942) (method for calculating overtime pay for weekly-wage employee did not violate FLSA simply because regular rate decreased as number of hours worked in a week increased, so long

as employee received, as overtime compensation, 150% of his regular rate). Therefore, because each employee is receiving 100% of his regular rate for each hour worked, plus an additional one-half of that regular rate for each hour in excess of 40 in a week, § 778.112 is a permissible interpretation of the FLSA, entitled to deference.

2.

For the reasons that follow, we conclude that § 778.112 applies to employees. The parties have stipulated that employees were paid a day–rate, paid regardless of the number of hours worked in a day. And, they are paid only for the number of days worked in a week.

Employees contend, however, that, before § 778.112 can be used to calculate their regular rate of pay, and, correspondingly, their overtime pay, they must clearly understand that the day–rate covers the hours the job may demand. They maintain that, because 29 C.F.R. § 778.114 requires a clear understanding prior to application, § 778.112 must as well.

The plain language of § 778.112 is directly contrary to this claim. It has no requirement that employees consent to its application. The triggering requirement is solely that employees are paid a day or job rate.

On the other hand, § 778.114(c) states: "The 'fluctuating workweek' method of overtime payment may not be used ... unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek". (Emphasis added.) But, employees here are *not* paid a salary for a workweek. Instead, they are paid for the number of days they work in a week: a day–rate.

Accordingly, § 778.114 does not apply. For FLSA purposes, employee agreement to application of § 778.112 is not required.

3.

Next, employees assert that § 778.112 applies only if no other form of compensation is received; and that, because they received sick days, paid vacation, and other fringe benefits, the provision cannot be applied to them. This point was not presented in district court. In fact, it was not raised here until employees' reply brief.

Generally, we do not address points raised for the first time in a reply brief. *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 270 (5th Cir. 1998). In any event, our review, at most, would be only for plain error. Under this quite narrow standard of review, if the error is "clear " or "obvious", and affects "substantial rights ", we have discretion to correct such forfeited error if it affects the fairness, integrity, or public reputation of judicial proceedings. *E.g., United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1196, 131 L. Ed. 2d 145, 115 S. Ct. 1266 (1995).

Sick days and other fringe benefits are not "other compensation". See 29 C.F.R. § 778.200 (1999) (for calculating regular rate for overtime pay, payments for vacation, holiday, illness, retirement, health insurance, or similar benefits not compensation). There was no plain error.

B.

Finally, employees seek assistance from their collective bargaining agreement (CBA).

1.

First, they note that the CBA defines a day as eight hours and the day–rate compensates them for such hours. They contend that, because a day is so defined, the day–rate compensates them only for up to eight hours worked, and, correspondingly, it cannot be used to compensate them for any hours worked in a day in excess of that. Consequently, they contend that BFI, in violation of the FLSA, has not paid them their regular rate for such excess hours.

This action, however, is for claimed violation of the FLSA overtime provisions, not of the CBA. Because the overtime payment method complies with § 778.112, this contention is without merit.

2.

Employees' contention that the CBA gives them an independent right to overtime pay after an eight-hour day is also without merit. The CBA states that this day-is-eight-hours-provision "shall not be construed as a basis for the calculation of overtime". Again, this dispute concerns, at best, a violation of the CBA, not the FLSA. (Needless to say, as employees concede, this action is not to enforce the CBA.)

III.

For the foregoing reasons, the judgment is

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ELDON P. DUFRENE, et al.

[Plaintiffs]

VERSUS

BROWNING–FERRIS, INC.

[Defendants]

CIVIL ACTION NO. 97-0877 SECTION "R"

[994 F. Supp. 748; 1998 U.S. Dist. LEXIS 1990; 4 Wage & Hour Cas. 2d (BNA) 729]

[February 18, 1998, Filed; February 19, 1998, Entered]

ORDER AND REASONS

Plaintiffs, comprised of residential truck drivers and hoppers,[1] and Defendant Browning–Ferris, Inc. ("BFI") filed cross motions for summary judgment. The Court rules as follows.

I. BACKGROUND

Plaintiffs in this case all work for BFI and are employed as residential truck drivers, residential route supervisors, and hoppers.2 Plaintiffs, on behalf of themselves and others similarly situated, brought this action to recover un-

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[1] The residential route supervisor plaintiff, Murray Broden, does not join in plaintiff's motion for summary judgment, and BFI's motion for summary judgment does not affect his claims because he is a salaried, rather than day-rate, employee.

[2] A hopper is the worker who runs alongside the garbage truck and picks up the garbage left on the sidewalk for collection.

paid minimum wages and overtime compensation from BFI. In Counts I and II, plaintiffs allege that BFI violated the Fair Labor Standards Act, 49 U.S.C. § 201, et seq. ("FLSA"), in two respects: (1) BFI failed to compensate its employees at a rate equal to or greater than the minimum hourly wage set forth at 29 U.S.C. § 206(a)(1); and (2) BFI failed to pay its employees overtime compensation in an amount equal to or greater than one and one half times their regular rate of pay for every hour worked in excess of 40 hours per workweek. Compl. §§ 49-65. Plaintiffs' claims arose under a now expired collective bargaining agreement between BFI and Teamsters Local 270, which represented BFI's employees.

In a Case Management Order signed by this Court on September 26, 1997, the parties stipulated that the method or policy used by BFI to calculate overtime for the driver and hopper plaintiffs is as follows:

> The method or process used by BFI to calculate overtime and the rate of overtime compensation paid for residential drivers, residential recycling drivers and hoppers is based on a day rate. The residential drivers are paid a day rate of $ 74.50 per day. The residential hoppers are paid a day rate of $ 61.75 per day. The Residential Recycling Drivers are paid a day rate of $ 76.00 per day. These wage rates and classifications are specified in Article 10 and Appendix A under the Collective Bargaining Agreement dated October 14, 1994. Employees are paid such day rates regardless of the number of hours worked in the day and BFI does not have a wage-payment policy limiting the number of hours an employee may work in a day. State and federal transportation and endurance

regulations limit the number of hours that a truck driver can remain behind the wheel. BFI is required to comply with these regulations.

The overtime compensation is calculated as follows: Employees are given their day rate and it is multiplied by the number of days worked to determine the amount of compensation due. The total amount of compensation is then divided by the number of total hours worked to derive the hourly rate. The hourly rate is divided by 2 and that amount is then multiplied by the number of overtime hours. This calculation yields the total amount to be paid in overtime. The overtime pay is then added to the day rate for the week for the gross earnings per week. The following is an example of the formula based on a residential driver.

Residential Driver Pay Rate: $ 74.50 Hours Worked for Week: 55

Total Hours Worked For Week = 55 Hours (40 hours + 15 Hours Overtime)

$ 74.50 Per Day x 5 Days Worked = $ 372.50

$ 372.50 / 55 Hours = $ 6.77 Per Hour / 2 (equivalent to 1/2 time) = $ 3.38 per hour

$ 3.38 Per Hour x 15 (number of overtime hours) = $50.79 Overtime Pay

Total Pay for Week: $ 372.50 (regular 40 work week) + $ 50.79 (overtime of 15 hours) = $ 423.29 Gross Earning for Week

Case Management Order at 2-3.

The parties filed cross motions for summary judgment. BFI contends that its overtime wage policy follows all applicable federal regulations and that plaintiffs are unable

to show otherwise. Plaintiffs assert that BFI's method violates the FLSA, and, even if the method is valid under the FLSA, BFI failed to comply with the requirements imposed by the regulations. Specifically, plaintiffs argue that BFI cannot establish that a clear mutual understanding existed on the part of the workers that the day rate compensation paid to them covered any and all hours worked in a day. Rather, plaintiffs submit that the workers understood that their compensation was based on an eight-hour day, forty-hour week.

II. DISCUSSION

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2551, 91 L. Ed. 2d 265 (1986). The court must be satisfied that no reasonable trier of fact could find for the nonmoving party, or in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

The controversy in this case centers around the application of two federal regulations relating to labor and overtime compensation as required by the FLSA. Section 7(a)(1) of the FLSA provides in pertinent part: "No employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-

half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Federal regulations provide the methods to calculate overtime compensation for workers who receive a fixed salary for fluctuating hours, whether weekly or daily. 29 C.F.R. § 778.114 applies to workers employed on a salary basis and states in pertinent part:

> An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Pay-

ment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

****

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked.

29 C.F.R. § 778.114.

Section 778.112 applies to day–rate employees, and it provides:

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

29 C.F.R. § 778.112.

A. The regulations do not violate the FLSA.

Plaintiffs first assert that the regulations violate the FLSA. The reasoning used in *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993), in which the Court of Appeals for the Seventh Circuit held that § 778.114 complies with the FLSA, is applicable in this case because both § 778.114 and § 778.112 calculate overtime for fixed-wage employees in the same manner. In Condo, the Seventh Circuit questioned whether the Secretary of Labor's regulations—embodied in § § 778.114 and 778.112—are permissible interpretations of § 7(a)(1) of the FLSA. The court used the three-step analysis established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), for judicial review of an agency's interpretation of a statute that it administers. First, the court must ask "whether Congress clearly expressed its intent in the plain language of the statute." Condo, 1 F.3d at 603. "If the language of the statute is determined to be either ambiguous or silent on the issue, however, the reviewing court is to proceed to a second inquiry: whether Congress delegated to the agency the authority to make the legal interpretation in issue." *Id.* at 604. Finally, if "Congress intended to deputize the agency with the authority to interpret the statute, the reviewing court is to make a third inquiry: 'whether the agency's answer is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782). Further, "so long as the agency's interpretation is reasonable, the court should defer to that interpretation and not impose its own construction on the statute." *Id.*

Section 7(a)(1) of the FLSA provides in pertinent part: "No employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The issue in this case is whether the fluctuating workweek method of computing overtime compensation is violative of the FLSA. Congress did not define "regular rate," nor did it instruct employers how to calculate overtime for workers whose hours fluctuate day by day or week by week. Thus, with respect to the first inquiry under *Chevron*, Congress did not express its intent with respect to the precise issue in this case.

The second inquiry of the *Chevron* analysis asks whether Congress delegated to the Secretary of Labor the authority to make the legal interpretation in issue. As the Seventh Circuit explained, Congress explicitly granted the Secretary of Labor the duty of administering the FLSA in 29 U.S.C. § 204. "By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret § 7(a)(1)." *Condo*, 1 F.3d at 605. In short, the Secretary's power to administer the FLSA would be ineffective if he could not interpret phrases left undefined and systems that went unaddressed.

The Court now moves to the third inquiry: whether the regulations at issue, § § 778.112 and 778.114, are permissible constructions of § 7(a)(1) of the FLSA. This Court agrees with the Seventh Circuit's analysis and holds that the regulations are permissible constructions of the FLSA. As made clear by the court in Condo:

> Under § 778.114 [and 778.112] an employee who receives a fixed weekly [or daily] salary for "all hours worked" receives the one and one-half times his regular rate for his overtime hours that is mandated by § 7(a)(1). The fixed salary compensates the employee for all his hours, the overtime ones included. He therefore receives 100% of his regular rate for each hour that he worked. As such, he is entitled only to an additional fifty percent of his regular rate for the hours that he worked in excess of forty.

Condo, 1 F.3d at 605. Although plaintiffs make much of the undisputed fact that the greater number of hours an employee works, the lower his rate will be, and the less he will receive in overtime compensation, "that does not cause the system to run afoul of the FLSA if, as in this case, the regular rate remains constant within each workweek and the employee receives one and one-half his regular rate for each overtime hour." *Id.* See also *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580, 62 S. Ct. 1216, 1221, 86 L. Ed. 1682 (1942) (acknowledging that longer hours produce less pay per hour but approving regulations' method of determining regular rate and stating that "this is not an argument ... against this method of determining the regular rate of employment for the week in question").

B. Plaintiffs are regulated under § 778.112, not § 778.114.

Having determined that the regulations providing for overtime compensation do not violate the FLSA, the Court next considers plaintiffs' contention that BFI has failed to comply with the regulatory requirements because the employees do not have a "clear mutual understanding" of the compensation scheme as is mandated under § 778.114.

This argument requires the Court to consider whether the applicable regulation is § 778.114, which expressly requires a "clear mutual understanding," or § 778.112, which does not.

It is uncontested that BFI compensates its residential truck drivers and hoppers on a day–rate basis. Case Management Order at 2; CBA, App. A, P 2, at 37-38 (replacing § § 10.01-10.03). Further, the parties stipulate that employees are paid the same day rates regardless of the number of hours worked in the day. Case Management Order at 2. BFI contends that the workers clearly fall under § 778.112 because plaintiffs are not employed on a salary basis, and they are specifically treated as day rate employees. BFI's primary argument is that, in contrast to what is contemplated under § 778.114, the workers are not paid if they do not work on a particular day. In other words, the workers do not receive a fixed weekly salary regardless of the days worked.

Plaintiffs suggest that § 778.112 does not apply to the workers because the day–rate/job–rate method of compensation described in that section was not designed for full-time, regular employees. Plaintiffs point out that the workers do not contract out their services and, instead, are employed on a regular basis by BFI. Further, after a probationary period, workers qualify to receive certain benefits, such as holiday pay and vacation time. See CBA, Arts. 16-18. In sum, plaintiffs argue that BFI should not be permitted to calculate the workers' overtime on the basis of § 778.112.

The Court agrees with defendants and concludes that, because the workers are paid according to a daily rate, BFI need not abide by § 778.114 and must only comply with

the requirements set forth in the regulation covering daily rate employees. The distinction between the two regulations is explicit: Section 778.112 applies to workers who are "paid a flat sum for a day's work or for doing a particular job" and, in contrast, § 778.114 applies to employees who are "employed on a salary basis." Department of Labor Regulations provide that an employee is considered to be paid "on a salary basis" within the meaning of the regulations "if under his employment agreement he regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.118(a) (emphasis added). Plaintiffs fail to meet this definition because they generally do not receive compensation for the days they do not work. The workers do not receive a flat salary per week regardless of how many days of the week they have worked. Instead, they are paid a daily rate, and their weekly salary is computed by multiplying the number of days worked by their daily wage. Accordingly, it is clear that they are covered by § 778.112, not § 778.114.

The Court reaches this conclusion despite the language in *Friedrich v. U.S. Computer Serv.*, 833 F. Supp. 470, 474-75 (E.D. Pa. 1993), that § 778.112 "seems" to apply to workers such as migrant workers and independent contractors. This Court finds that § 778.112 is not on its face so limited and its language is broad enough to encompass

regular employees such as the plaintiffs who are explicitly employed on a daily-rate basis.

The Court notes that the CBA refers to its method of calculating overtime compensation as the "fluctuating workweek" method, which is the terminology found in Section 114. CBA, App. A, P 3, at 38-39 (replacing sec. 12.01) (overtime compensation will "be calculated in accord with the Fair Labor Standards Act, utilizing the fluctuating work week method"). The methods of calculating overtime under § § 112 and 114 are the same, only one regulation applies to day rate employees and the other applies to salaried employees. Plaintiffs argue that BFI may rely upon the "fluctuating work week" method only if they satisfy the prerequisites set forth in § 778.114(c). Despite the terminology used in the CBA, the requirements of § 114 do not apply to workers who fall under § 112. In a situation such as this one, in which the workers were paid on a "flat-sum-per-day-regardless-of-hours-worked basis," § 112 applies and the constraints imposed by § 114 are not applicable. See South Florida Beverage Corp. v. Figueredo, 409 So. 2d 490 (Fla. Ct. App. 3d Dist. 1981) (finding § 112 applicable to route drivers who were paid on a "flat-sum-per-day-regardless-of-hours-worked basis," even though the employment contract specifically referred to calculating overtime under § 114).

C. There was a "clear mutual understanding" between the workers and BFI.

As noted earlier § 778.112, unlike § 778.114, does not contain a requirement that the parties have a clear mutual understanding "that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for

working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a). Moreover, the Court does not read such a requirement into § 112. However, the Court finds that even if such a requirement of a clear mutual understanding were to apply in this case, it is satisfied here.

When the "clear mutual understanding" requirement of § 778.114 applies, "neither the regulation nor the FLSA in any way indicates that an employee must ... understand the manner in which his or her overtime pay is calculated. Nor do the regulation and the FLSA in any way indicate that an employer must secure from its employees written acknowledgments indicating that the employees' pay plan has been explained to them." *Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996). Rather, § 778.114 requires only "a 'clear mutual understanding' between employer and employee that the fixed salary is to be compensation for all straight time hours worked, whether few or many." *Mayhew v. Wells*, 125 F.3d 216, 219, 1997 WL 560071, at *3 (4th Cir. 1997) (repeating holdings from Bailey, 94 F.3d at 156; *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1281 (4th Cir. 1996)). Further, it is clear that "the existence of such an understanding may be based on the implied terms of one's employment agreement if it is clear from the employee's actions that he or she understood the payment plan in spite of after-the-fact verbal contentions otherwise." *Mayhew* 125 F.3d at 219, 1997 WL 560071, at *3.

Plaintiffs contend that the workers did not understand that the day rate compensated them for all hours worked, whether few or many. Rather, plaintiffs submit that the workers believed that the day rate compensated them for

all hours worked up to eight hours. In support of this contention, plaintiffs rely on: (1) the CBA's statement that a normal workday consisted of eight hours; (2) BFI's internal productivity documents showing regular time as eight hours; (3) affidavits from workers stating that they understood that the day rate compensated them for eight hours; (4) BFI's overtime calculation demonstrating a five-day, forty-hour week; and (5) BFI's admission that overtime was calculated on the basis of a forty-hour week.

Section 10.01 of the CBA provides for hourly rates of pay for hourly workers. These plaintiffs however were governed by Appendix A, which specifically states that the hourly rate classifications do not apply and that plaintiffs are paid a set rate per day. CBA, App. A, P 2. It is true that the CBA states that "the normal work week shall be forty (40) hours consisting of five (5) work days of eight (8) hours each, which eight (8) hours shall be consecutive except for the lunch period." CBA, Art. 9, sec. 9.01, at 14.[3] Despite this language, however, the CBA also makes clear that "nothing in this Article shall be construed as a guarantee of hours or work per day or of days of work per week. The provisions of this Article shall not be construed as a basis for the calculation of overtime." *Id.*, sec. 9.03, at 15. This section of the CBA thus expressly negates the idea that it can be relied on to establish the base for overtime.

The CBA also contains provisions that apply to hourly rate employees, specifically providing for overtime for

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[3] As the court found in *Florida Beverage Corp.* v. *Figueredo*, 409 So. 2d 490 (Fla. Ct. App. 3d Dist. 1981), setting forth the "normal work week" as forty hours, consisting of five days of eight hours each, is merely "declaratory of and meaninglessly redundant to what the FLSA already provides insofar as overtime pay is concerned." *Id.* at 495.

work performed in excess of eight hours in a day. See CBA, sec. 12.01. These plaintiffs, however, are covered by Appendix A, which makes clear that Section 12.01 does not apply to them. CBA, App. A, P 3. Rather, as to these day rate employees, Appendix A provides: "Employees shall receive premium pay for all hours worked in excess of forty (40) in any one (1) work week, said premium pay to be calculated in accord with the Fair Labor Standards Act, utilizing the fluctuating work week method." Id., App. A, P 3, at 38-39 (replacing sec. 12.01). We have already seen that this method is not based on an eight-hour day but on the total hours worked divided into the sum of the day rates received for the pay period. Further, Appendix A modifies six other provisions of the agreement to delete references to "eight (8) hour" days and to substitute "one (1) day" for eight hours. Appendix A undermines plaintiffs' contention that their regular day was eight hours.

Plaintiffs assert that pay statements they received did not state the amount of overtime hours worked and only stated the total overtime due. However, these statements confirm that plaintiffs were paid by the day at the rate specified in the contract prior to the application of the overtime premium, and they are consistent with the contract documents.

Nor does BFI's interrogatory response that overtime was calculated on the basis of a forty-hour week negate a clear mutual understanding. Such an admission is simply BFI's acknowledgment of the standards set by the FLSA in 29 U.S.C. § 207(a)(1) and the reality of how it computed overtime using the fluctuating workweek formula.

BFI's internal productivity documents do not bear on the "clear mutual understanding issue" between BFI and its workers. The residential drivers and hoppers did not have regular access to these documents so the workers "understanding" is not informed by the documents' contents. Further, these "daily productivity sheets" were used mainly to keep track of the productivity of its drivers and hoppers. *Id.* P 7. BFI's use of "regular time" in these documents should not prevent BFI from using an alternative calculation in determining workers overtime compensation as provided in its contract.

BFI's illustrative overtime calculation, attached as Exhibit 1 to BFI's motion, also does not establish that the daily rate compensates each worker for only eight hours. The example clearly shows that the hourly rate is determined by dividing the base rate (i.e., the daily rate x the number of days worked) by the total number of hours worked in the week. Under the plaintiffs' understanding, the hourly rate would be attained by dividing the daily rate by eight (hours) or by dividing the base rate by forty (hours). Given the obvious discrepancy between these hourly rates, workers could not be led to conclude that the day rate was compensation for only eight hours. Moreover, the workers never stated that BFI's example contributed to their understanding.

The parties dispute whether BFI specifically informed each plaintiff of its method of computing overtime. The issue however is whether there was a mutual understanding that the day rate covered all hours worked in the day, exclusive of overtime premiums. Plaintiffs' after-the-fact attestations that they thought the day rate compensated them for work up to eight hours per day cannot overcome

the clear import of the CBA, which nowhere says that the day rate is for eight hours, which expressly deleted the references to an eight-hour day in computing compensation, overtime, holiday pay, and attendance bonuses, and specifically referred to an overtime formula that computes the straight time rate by dividing the total hours worked in the pay period into the sum of the day rates received.

Because the terms of the CBA provide ample basis for a clear mutual understanding that the plaintiffs would be paid the day rate regardless of the number of hours worked in a day, the Court finds that there was a clear mutual understanding even if Section 778.114 applied.

For all of the foregoing reasons,

IT IS ORDERED that defendant's motion for summary judgment is GRANTED, and plaintiffs' motion is DENIED.

New Orleans, Louisiana, this 18th day of February, 1998.

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

(2)

No. 99-2043

In The

Supreme Court of the United States

ELDON DUFRENE, et al.,

Petitioners,

v.

BROWNING-FERRIS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners were employed by respondent Browning-Ferris, Inc. ("BFI") pursuant to a Collective Bargaining Agreement, which provided that they would be paid a specified sum "per day." A long-standing Interpretive Bulletin of the United States Department of Labor, published at 29 C.F.R. § 778.112, specifies how the overtime compensation required by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), is to be calculated for such day-rate employees. The question presented is:

> Whether the FLSA permits an employer to calculate overtime compensation for its day-rate employees according to the formula contained in 29 C.F.R. § 778.112.

RULE 29.6 STATEMENT

Respondent Browning-Ferris, Inc. is a wholly-owned subsidiary of Browning-Ferris Industries, Inc., which is in turn a wholly owned subsidiary of Allied Waste North America, Inc. Allied Waste North America, Inc. is a wholly owned subsidiary of Allied Waste Industries, Inc., which is a publicly held company. Other than Allied Waste Industries' indirect ownership, no publicly held company owns 10% or more of Browning-Ferris, Inc.'s stock.

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STATEMENT

The Petitioners, present or former employees of Respondent Browning-Ferris, Inc. ("BFI"), filed this lawsuit contending that BFI had failed to pay them overtime compensation as required by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). The District Court granted BFI summary judgment on Petitioners' overtime compensation claim, Pet. App. 9, and a unanimous panel of the Fifth Circuit affirmed. *Id.* at 1.

Petitioners (hereafter "Workers") and BFI were parties to a Collective Bargaining Agreement, which provided that Workers were to be paid a specified sum "per day," Record on Appeal ("R.A.") 547-48, and that their overtime compensation would be calculated "in accord with the Fair Labor Standards Act, utilizing the fluctuating work week method." R.A. 548-49.

Section 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1), provides that an employee is entitled to overtime compensation for hours worked in excess of 40 in any week "at a rate not less than one and one-half times the regular rate at which he is employed." The statute, however, "contains no definition of regular rate of pay and no rule for its determination." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948); *see also Condo v. Sysco Corp.*, 1 F.3d 599, 604 n.6 (7th Cir. 1993) ("Although the 'regular rate' is at the heart of § 7(a)(1), the FLSA does not explain how it is computed.").

To fill this gap in the statute, the United States Department of Labor ("DOL") has issued a series of Interpretive Bulletins specifying how the "regular rate" should be calculated in various situations. *See* 29 C.F.R.

Part 778. In particular, the Interpretive Bulletin codified at 29 C.F.R. § 778.112 specifies the manner in which the "regular rate" shall be calculated for employees who are, like Workers, "paid a flat sum for a day's work * * * without regard to the number of hours worked in the day." For such day-rate employees, the "regular rate" "is determined by totaling all the sums received at such day rates * * * in the workweek and dividing by the total hours actually worked." *Id.* The employee "is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek." *Id.*

In the District Court, the parties stipulated that BFI calculated Workers' overtime pay using the method specified in § 778.112:

> Employees are given their day rate and it is multiplied by the number of days worked [in a week] to determine the amount of compensation due. The total amount of compensation is then divided by the total number of hours worked to derive the hourly [or "regular"] rate. The hourly rate is then divided by 2 and that amount is multiplied by the number of overtime hours. This calculation yields the total amount to be paid in overtime.

Pet. App. 2 (quoting parties' stipulation).

The Collective Bargaining Agreement does not limit the number of hours BFI may require that Workers work in a day; to the contrary, the contract expressly provides that "the sole and exclusive rights of management reserved to the Company * * * include, but are not in any way confined to: the planning of work schedules, including the determination of the number of hours per day or

per week that operations shall be carried on; [and] the assigning of drivers to routes or territories * * * ." R.A. 514; *see also* R.A. 524 ("The Company retains the right to schedule the work and, from time to time, to change the work schedules to meet the varying conditions of the business."). The contract also explicitly recognizes BFI's right to require that employees work overtime. R.A. 529 ("It is recognized that from time to time it may be necessary to work overtime. Any employee qualified to do the work available can be required to work such overtime hours by the Company.").

Although they make neither of these arguments in their Petition, in the courts below Workers primarily attacked BFI's overtime compensation calculations by arguing that the DOL Interpretive Bulletin codified at 29 C.F.R. § 778.112 violates the FLSA, and that Workers should be subject to a separate Interpretive Bulletin (29 C.F.R. § 778.114) applicable to workers paid a weekly salary. Relying largely on *Condo v. Sysco Corp.*, 1 F.3d 499 (7th Cir. 1993), the District Court held that § 778.112 is a permissible agency construction of the FLSA's overtime compensation provisions, since Congress did not define the "regular rate" in the statute, and § 778.112 in fact assures day-rate employees the 50% overtime premium required by § 7(a)(1). Pet. App. 15-17. The court also rejected Workers' argument that they were subject to the DOL Interpretive Bulletin governing employees paid a fixed weekly salary (§ 778.114), since

> [t]he workers do not receive a flat salary per week regardless of how many days of the week they have worked. Instead, they are paid a daily rate, and their weekly salary is computed by

> multiplying the number of days worked by their daily wage.

Pet. App. 19.

Although Workers argued that § 778.112 should be limited to persons employed on a sporadic or seasonal basis, the District Court refused to read any such limitation into the regulation, since "§ 778.112 is not on its face so limited and its language is broad enough to encompass regular employees such as the plaintiffs who are explicitly employed on a daily-rate basis." Pet. App. 20. The District Court noted that its resolution of this issue was consistent with the only prior appellate decision addressing a similar claim. *Id.* (citing *South Fla. Bev. Corp. v. Figueredo*, 409 So.2d 490 (Fla. App. 1981), *cert. denied*, 459 U.S. 881 (1982)).

A unanimous Fifth Circuit panel affirmed. Like the District Court, the Court of Appeals concluded that BFI's overtime compensation calculation fully complied with 29 C.F.R. § 778.112, and that § 778.112 represents "a permissible interpretation of the FLSA, entitled to deference." Pet. App. 6. The appellate court likewise rejected Workers' argument that their overtime pay should be calculated according to the DOL regulation governing employees paid a weekly salary: "[E]mployees here are *not* paid a salary for a workweek. Instead, they are paid for the number of days they work in a week: a day-rate." *Id.* (emphasis original).

REASONS FOR DENYING THE PETITION

Because it satisfies none of the criteria listed in this Court's Rule 10, the Petition for Writ of Certiorari should be denied. The decision below reflects nothing more than a straightforward application of a long-standing, and valid, Department of Labor interpretive regulation. The Court of Appeals' decision is fully consistent with this Court's decision in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), and with the only other appellate decision addressing the same issue. As the dearth of apposite decisions attests, the Question Presented is neither "far reaching" nor "recurring", as the Petition claims. Although the Petition claims BFI unilaterally designated Workers as "day-rate" employees, they were classified that way by a Collective Bargaining Agreement; that agreement also expressly recognizes BFI's prerogative to set work schedules, and require overtime where it deems necessary. Finally, the restrictions Workers ask this Court to impose on freely negotiated compensation arrangements have no basis in any statute or regulation, but would require this Court to fashion wage-and-hour policy from whole cloth, with nothing to guide it but Workers' view of what best furthers the FLSA's humanitarian objectives.

1. Workers first claim that BFI's overtime compensation practice violates this Court's holding in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). Pet. 8-9.

Although it is the centerpiece of their Petition, Workers did not cite the *Missel* decision in their briefs in the Court of Appeals, or argue that BFI's method of

calculating overtime premiums somehow violated the "essential requirements" supposedly erected by *Missel*. By failing to raise the argument below, Workers have waived their new claim that the opinion below conflicts with *Missel*. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Granfinanceria, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989).

Even if Workers' argument were properly presented, however, the Fifth Circuit's decision is consistent with *Missel*. In that case this Court held that overtime pay for workers paid a flat sum for fluctuating hours should be calculated exactly as BFI did here: divide total weekly compensation by the hours actually worked to derive the "regular rate," and pay an additional 50% of this regular rate for all overtime hours. 316 U.S. at 580 & n.16.

Workers' claim of a conflict rests on a gross mischaracterization of *Missel*'s holding. In that case, an employer paid an employee a flat sum per week, regardless of the hours the employee worked. Although the employee at times worked as many as 80 hours per week, the employer argued that *no* overtime premium pay was required, because the flat weekly salary was large enough that the employee was at all times paid more than the minimum wage for hours up to 40 per week, and more than 150% of the minimum wage for hours worked in excess of 40. *Id.* at 574-75. The Court rejected this argument, holding that the agreed weekly salary represented only "straight-time" compensation, and that, as the FLSA mandated, the employee was entitled to an additional overtime premium equal to 50% of his regular rate for hours worked in excess of 40 per week. *Id.* at 580-81; *see also id.* at 577 ("an intended effect [of the Act] was to

require extra pay for overtime work by those covered by the act *even though their hourly wages exceeded the statutory minimum*"; emphasis added).

Missel's statements that the contract placed "no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage," and contained "no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage" must be understood against this backdrop – the employer claimed that the employee was not entitled to overtime pay *under any circumstances*. By contrast, the Collective Bargaining Agreement at issue here specifically provided that BFI's day-rate employees would receive additional compensation "in accord with the [FLSA]," over and above their fixed wage, if they worked in excess of 40 hours in a workweek. R.A. 548-49. The Fifth Circuit's endorsement of the parties' collectively bargained pay scheme is perfectly consistent with *Missel*.

Further, *Missel* does not place any absolute limit on the number of overtime hours an employee can be required to work in any week. To the contrary, *Missel* recognized that the FLSA does not prohibit or limit overtime, but instead simply applies "financial pressure" on employers who choose to use overtime work rather than hiring additional personnel. 316 U.S. at 577-78; *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 472 (1948) ("[T]here is no prohibition [in the FLSA] on regular working hours that are longer than the statutory maximum. * * * The statutory maximum hours are significant only as requiring overtime premium pay.").

2. Although Workers do not say so explicitly, their challenge to BFI's calculation of their overtime compensation is necessarily an attack on the validity of the DOL's Interpretive Bulletin, 29 C.F.R. § 778.112. The Petition does not claim that BFI's calculation violates § 778.112; instead, Workers argue that this Court should limit that regulation to persons employed on a seasonal or sporadic basis, and to employees whose work day is limited to a specific number of hours or defined according to the performance of specific tasks.[1] But, as the courts below recognized, no such limits appear in the regulation itself (or, for that matter, in FLSA § 7(a)(1)).[2] If this Court were to grant the Petition and rule in Workers' favor, such a decision would necessarily repudiate the DOL's long-standing interpretation of the FLSA.

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[1] Although not raised in the text of their Petition, Workers' Question Presented also suggests that § 778.112 should not apply to employees who receive fringe benefits beyond their daily wage. Pet. i. But Workers did not make this argument until their Reply Brief in the Court of Appeals, and the Fifth Circuit accordingly held that the argument had been waived. Pet. App. 7. In any event, both the FLSA itself and the DOL's regulations specifically exclude the fringe benefits Workers cite from the calculation of an employee's "regular rate." *See* 29 U.S.C. § 207(e)(2), (e)(4); 29 C.F.R. §§ 778.214, 778.215, 778.218.

[2] The Petition implies that, to comply with § 778.112, an employment contract must define a "day's work," presumably by setting a temporal limit of less than 24 hours on the workday. Pet. 7. But the regulation clearly states that it applies to employees who are "paid a flat sum for a day's work * * * *without regard to the number of hours worked in the day*"; § 778.112 clearly does not require that a "day's work" be limited to a set number of hours.

As the courts below correctly held, *see* Pet. App. 4-6, 15-17, the Department of Labor's interpretation of § 7(a)(1) as it applies to day-rate employees is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, as noted above, Congress has not specified in the FLSA how employees' "regular rate" should be calculated.

Second, this Court long ago recognized that, because the Department of Labor administers the FLSA, its interpretations of the Act are entitled to deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.17 (1942).

Third, the Department of Labor's application of § 7(a)(1) to day-rate employees is a permissible construction of the Act. As discussed above, more than 55 years ago, this Court in *Missel* upheld the Administrator's interpretation of § 7(a)(1) in the analogous situation where workers were paid a fixed sum per week, regardless of the total hours worked (now codified in 29 C.F.R. § 778.114). 316 U.S. at 580 & n.16. Since *Missel*, numerous lower-court decisions have held that the "regular rate" for workers paid a fixed sum for fluctuating hours should be calculated as specified in the DOL regulations followed by BFI here: divide the total compensation earned during the week by the hours actually worked, and pay an additional 50% of this "regular rate" for hours in excess of 40. *See, e.g., Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 40 & n.3 (1st Cir. 1999); *Roy v. County of Lexington*, 141 F.2d 533, 547 (4th Cir. 1998); *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir. 1993); *Blackmon v. Brookshire Grocery*

Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988); *Highlander v. KFC Nat'l Mgmt. Co.*, 805 F.2d 644, 647 (6th Cir. 1986).

3. Workers argue that certiorari is warranted because, under the decisions below, "BFI remains free to unilaterally dictate, increase, and control the number of hours that Workers must labor." Pet. 4. In a similar vein, Workers also repeatedly claim that "*BFI* classified and paid Workers as day rate laborers." Pet. 6 (emphasis added). But this is not a case of employer overreaching or oppression: what Workers conveniently ignore is that they themselves agreed to be paid a fixed sum "per day" in the Collective Bargaining Agreement, and further agreed that their overtime compensation would be calculated according to "the fluctuating work week method." R.A. 547-49. In that collectively bargained agreement, Workers also expressly recognized that the scheduling of work shifts, including the requirement that employees work overtime, was a management prerogative reserved to BFI. R.A. 514, 524, 529. This is *not* a case in which "the employer [had] the sole authority to make each working man and woman in this country * * * a day rate worker," Pet. 12; rather, this is a case in which Workers freely and voluntarily agreed to such an arrangement through their union representatives, and now seek to repudiate the bargain they struck.

4. Workers also complain that "BFI placed no limit upon the hours that BFI can require Workers to labor * * * to earn their 'day rate.' " Pet. 4; *id.* at 8 ("There is no temporal limit on a day * * * ."). It is unclear what legal import Workers attach to the fact that the "per day" compensation to which they agreed is not limited to a

specific number of hours in the day. Workers acknowledged in the Court of Appeals that "[t]he FLSA places no restriction on the number of hours that an employee can work in a day." Brief for Appellant [sic] at 26; *see also Missel*, 316 U.S. at 579 ("the unit of time under [ ] section [7] within which to distinguish regular from overtime is the week"). Since (as Workers concede) the FLSA says nothing about the length of the workday, the fact that the Collective Bargaining Agreement does not limit the hours Workers may be required to work in a day is irrelevant to the question of BFI's compliance with the FLSA.

5. Workers suggest that certiorari should be granted because the Fifth Circuit's decision purportedly conflicts with *Friedrich v. U.S. Computer Services, Inc.*, 833 F. Supp. 470 (E.D. Pa. 1993). Workers identify no appellate decision, state or federal, in purported conflict with the decision below.

Even if the Fifth Circuit's decision conflicted with *Friedrich*, a conflict with a District Court decision does not justify certiorari. And the decisions are not in conflict in any event. In *Friedrich*, "each employee had an annual salary[,] * * * [which] was divided by 52 to determine the employee's weekly salary." *Id.* at 472. Unlike here, the employees in *Friedrich* "received the same pro-rata portion of their annual salaries every two weeks, *regardless of the number of days or hours they worked.*" *Id.* at 474 (emphasis added). In these circumstances, it is hardly surprising that the court determined that § 778.112, which is explicitly limited to employees "paid a flat sum for a day's work," was inapplicable.

Because the workers in *Friedrich* were paid a weekly salary and were therefore clearly not subject to an overtime calculation applicable to day-rate employees, *Friedrich*'s musing that the day-rate regulation "seems to apply" to seasonal workers and independent contractors (833 F. Supp. at 474-75) is pure dictum. (That suggestion is also erroneous, since there is no basis in § 778.112 to justify limiting the regulation in this way.) Even if the Fifth Circuit's decision conflicts with that district-court dictum, certiorari is unwarranted.

What the Petition fails to mention is that the decision below is consistent with the only other appellate court decision addressing the same issue. Like this case, *South Florida Beverage Corp. v. Figueredo*, 409 So.2d 490 (Fla. App. 1981), *cert. denied*, 459 U.S. 881 (1982), involved regular, full-time employees paid a daily rate pursuant to a collective bargaining agreement. Like the courts below, *Figueredo* held that the overtime compensation of these employees was properly calculated according to 29 C.F.R. § 778.112. Notably, even the *Friedrich* court recognized that § 778.112 provided the proper method for calculating overtime for the employees in *Figueredo*, since "[t]he plaintiffs in that case truly were day-rate employees: they received a flat sum for a day's work regardless of the number of hours they worked that day." 833 F. Supp. at 475.

Beyond the lack of a circuit conflict, the fact that the most recent on-point decision is nearly 20 years old shows that the Question Presented is neither "important" nor "recurring"; even if it were erroneous, the Fifth Circuit's application of the FLSA to the relatively unusual

situation of employees paid a flat sum per day does not merit certiorari review.

6. Workers' final argument in favor of granting certiorari is their plea that "[t]here must be boundaries set by the courts to guide employers and employees in identifying the types of employees and the employment circumstances that must exist for an employer to classify and pay its employees as day rate laborers." Pet. 12. But Workers identify no basis in law, apart from this Court's sense of economic justice, from which such "boundaries" could be determined.

The fact is that in enacting the FLSA Congress chose the limited mechanism of simply requiring that employees be paid a premium, based on the "regular rate" to which they and their employers have agreed, for all hours in excess of 40 worked in a particular week; the Act does not prohibit or limit overtime, limit a worker's daily hours, or specify any particular overtime premium wage. And in its Interpretive Bulletins, the Department of Labor has chosen not to impose the limitations on negotiated pay schemes which Workers now advocate. In these circumstances, this Court cannot legislate additional worker protections simply because it believes that doing so might be consistent with Congress' general objectives. *See Director, OWCP v. Newport News Shipbuilding Co.*, 514 U.S. 122, 136 (1995) (principle of liberally construing remedial statutes "does not add features that will achieve the statutory 'purposes' more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means * * * ."); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) ("To the point that courts could achieve 'more'

of the legislative objectives by [adding provisions to the law], it is enough to respond that statutes have not only ends but also limits.").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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